

Ninth Meeting of European Labour Court Judges

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GERMANY

THE ROLE OF LABOUR COURT JUDGES IN THE IMPLEMENTATION OF SOCIAL POLICIES

Questionnaire

**General Reporter: Judge Stephen Adler, President
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1 Labour Court Judges and Social Policy

a) In what areas do judgments of your or other courts in your country pertain to social policy by either implementing or creating policies?

Possible areas:	Yes	No
- freedom of association	☒	☐
- collective bargaining	☒	☐
- strikes	☒	☐
- prevention of collective conflicts	☒	☐
- equality at the work place	☒	☐
- the definition of "employee"	☒	☐
- the definition of who is the "employer" of people performing certain types of work	☒	☐
- the application of labour law to irregular, disguised, or ambiguous working relationships	☒	☐
- education or occupational training	☒	☐
- freedom of occupation and non-competition clauses	☒	☐
- work safety	☒	☐
- protection of vulnerable groups (such as unskilled people, foreign workers, disabled people, etc).	☒	☐
- other (please describe)		

Protection against unfair dismissal; protection of the right of the individual worker or employee.

b) What has been, in general, the contribution of the labour courts in your country to the development of social policy? (Please see under (c) before answering this.)

Social policy means in Germany two different matters: labour (or industrial) affairs and social affairs. The regulations in social affairs (social insurance, insurance against unemployment and so on) are administrative law and dealt in the courts of social affairs. The regulations in labour affairs are civil law and are dealt in the labour-courts. Most normative regulations (constitution, laws) in the field of labour affairs are “open” to developing judgements. There are a lot of these normative regulations, but ” Labour law is judges law” as a very famous professor on labour affairs resumed.

c) Relating specifically to freedom of association, what has been the labour courts’ role in developing and/or implementing your country’s social policy?

There is only one article in our federal constitution (Art. 9 III Grundgesetz), providing the everybody’s constitutional right of freedom of association or - in German - freedom of coalition. All the special items had to be and have been developed by labour courts judgements.

d) Describe briefly some labour court judgments which have implemented or determined social policy; if possible, relating to freedom of association, including the protection or encouragement of trade unions and collective agreements.

There are a very lot of judgements concerning the freedom of coalition, for example:

- interdiction to inquire the employee after his membership in a trade union;
- interdiction to make employment depending on being no member in a trade union;
- all sub-constitutional rules and regulation concerning strike and lockout;
- a non-written right of the trade union for a cease and desist judgement against an employer in case he will get round or circumvent the rules of a binding collective agreement.

e) Have there been instances in which labour court decisions relating to social policy have been incorporated into statutes, changed by statutes, or adopted by the general courts?

Yes, there are a lot of instances, in which a special kind of interaction between the labour courts and the legislation has taken place, for example:

- Rules against unfair dismissal (developed by judgements before 1951, law in 1951, jurisdiction developed the law, then legislation changed some rules of that jurisdiction in 1996 and – after changing the government – legislation “corrected” the law back.
- The rules on temporary work have been in 1960 developed by judgements, these rules have on the one hand been adapted, on the other hand changed by legislation in 1985, 1989 and 1996, in 2000 legislation made a complete law on this matter.

- Until 1974 the contention on company-pensions became invalid, if the employee changed the company. Jurisdiction developed the such contentions have to stay valid after 20 years. The legislative changed in the statutes the term to maximum ten years and – just now concerning a special kind of the promises – on now minimum time.

f) Is there a connection between social policy and social justice in labour court judgments? Please explain.

Yes, there is as a - in my opinion normal - connection in the main stream. Sometimes some (younger) judges try to make some “political” progress. Of course, every judgement in labour affairs has a political effect, but it is – general opinion – not up to justice to make politics. On the other hand: Developing the rules by judgements is necessary and in the frame of the constitution, if the legislative is not able to make laws, as the Bundesverfassungsgericht (federal constitution court) decided.

2 Labour Court Judges and Access to Justice

a) What has been the contribution of the labour courts in your country to effectively ensuring the appearance before the judge on truly equal terms for all parties involved? To what extent is this contribution related to aspects such as cost (for instance, exemption from certain court costs for the financially weaker party); the possibility for workers to receive professional assistance by a lawyer or to be represented by other experts (for free?); the possibility for trade unions to appear in court (on their own behalf, as representatives of their members, and under what conditions if any); and the burden of proof?

This question needs different answers in the different instances.

Before the court of first instance every body can appear personally and – as a plaintiff - institute proceedings against the other party. If the plaintiff is not able, to do that by his own writing, he is allowed to take the help from a courts secretary (Rechtspfleger). In this case the courts secretary will file the action, but he will not be the plaintiffs agent. It is also allowed, that the plaintiff takes the help of a (specialised) trade union secretary (Rechtssekretär) resp. of a representative of an employers association (Verbandsvertreter) or - open to both parties on their own costs – the help of a professional lawyer.

More than 90% of all actions are filed by employees. Relatively most of them take a trade-union secretary as an agent. They do not have to pay a special fee for this help. An other great part of plaintiffs take – at their own costs or at the cost of an insurance-company- a lawyer.

Before the judge in the court of first instance takes a hearing place. Both parties themselves and / or their agents are allowed to appear and to negotiate in that hearing. The first hearing is only a conciliation proceeding. At about 50% of all cases are settled without judgement in this first hearing. Most of them by an agreement on the proposal of the judge. In this case the court will take no costs. In the case of a judgement the courts costs in the first instance are very low (between 20,-- and 1.000,-- DM or 10,-- and 500,-- Euro -€ -). The costs court hat to bear the weaker party, the costs of her agent has to bear every party herself. In case, that one party is not able to bear the costs, which are necessary for a fair proceeding they can ask for a financial contribution from the court (aid to the costs of proceeding).

In the second instance (Court of appeal – Landesarbeitsgericht) nobody is allowed to make

the necessary proceedings by himself. In all cases both parties have to take either an trade union secretary resp. a representative of an employers association or a lawyer. In the third instance (Bundesarbeitsgericht) everybody has to take a lawyer. In both instances the courts fees are the normal ones, the weaker party has to bear all the costs of the second instance. It is possible (but rare) to take aid to the costs of proceeding.

- b) In what manner and to what extent is the labour court able to reconcile careful analysis leading to well-founded and impartial rulings, with the need, strongly felt in the area of labour law and social protection, for a rapid delivery of judgements? (This may include a discussion of issues such as the use of new technologies; “out-sourcing” of certain tasks (formerly) performed by judges; shortening of deadlines; oral procedures.)**

The periods of time between filing an action and settling the proceeding are not so very long. More than 50% of all cases in the first instance are settled within 3 months, more than 90 % within 6 months. The best acceleration will be made with a good prepared hearing in a short time. If the case needs a judgement, it is very helpful to prepare the case for only one hearing (after the normal first conciliation proceeding hearing). Therefore it is necessary that all relevant facts and figures are in the files of the court, all evidences and proofs are leaded and – of course – that the judge has worked out the proceeding. But the kind of preparing a hearing belongs to the freedom of the judge. A very lot of them work in the mentioned matter, some other do not and they need some more time than the other ones. Shortening deadlines to the litigants makes sense, but only, if the judge is able to make the hearing in a short time period.

- c) Do you consider, in this regard, that the requirement of an efficient labour court raises the question for the judge to also develop personal managerial qualities?**

Yes. And they need some knowledge of rhetoric and psychology too.

3 Labour Court Status and Social Policies

- a) Is the role of your court, or other courts in your country, limited to the implementation of social policy set in statutes? Or do your court's judgments include judge-made law regarding social policy?**

Our courts judgements include judge made law regarding social politics in labour affairs.

- b) In your opinion, should labour courts adopt a role of “judicial activism”, especially relating to judge-made social policy?**

Yes and no. Yes, if the legislation is not able to solve important problems. No as long as the legislation tries to make the necessary laws in an adequate period of time. The primat is to the legislation. Judges are law makers out of (political) poverty.

4 The Judge's Personal Condition and Social Policy

- a) **What is the role of individual judges' personal values, philosophy and outlook on life in their judgments? What is their role (personal influence) in deciding social policy issues?**

It depends from the personality of the judge. Of course every judge is living, working and deciding with respect to constitution and law, but there is always the point of his view of life. The personal influence in social political issues outside the court is not one by law, but by personal political engagement.

- b) **How do judges learn about social problems, social issues at the workplace and social values? In other words, how are judges trained to deal with social policy?**

There is no training in these matters ex officio. We are learning from the everybody's media as books, newspapers, TV, radio. And some of the judges try to have contact with employers and employees, trade unions and employers associations just for keeping in shape with the developments in the field of labour affairs.

- c) **Is this adequate in your view, and how should they be trained?**

In my opinion the best training would working in plants, works, trade unions, employers associations while some sabbaticals.

5 Lay Judges, Professional Judges and Social Policy

In case your labour courts have professional and lay judges:

- a) **What is the role of lay judges (public representatives) in implementing and making social policy and deciding issues relating to social policy?**

The role of the lay judges is to implement their knowledge and experiences from their personal places in the field of labour.

- b) **What is the lay judges' contribution to the judgement itself, if any? (Would they be able to overrule the professional judge, for example?)**

Every lay judge has the same vote as the professional judge. In the first and in the second instance the two lay judges are able to overrule the one professional judge. In the third instance there are three professional and two lay judges.

- c) **Are the perspectives and ideas of lay judges on social policy different than those of the professional judges?**

Sometimes, but not very often.

- d) **Are there any patterns in the way lay judges decide on matters relating to social policy? For example, do lay judges representative of labour usually vote to implement social rights while lay judges representative of management vote to oppose them?**

In the normal case not. Sometimes it seems, there could be some political points of view with respect to the organisation which the lay judge belongs to.

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